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No. 07-

Supreme Court, U.S.
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In The

Supreme Court of the United States

WINFORD KENT BISHOP,

Petitioner,

v.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT,

Respondent.

On Petition For Writ Of *Certiorari*
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF *CERTIORARI*

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December 31, 2007

QUESTIONS PRESENTED FOR REVIEW [1]

1.

By **conclusively presuming** intentional ignoring of unidentified mail slips in a shared post office box, contrary to its own administrative factfinding, and not requiring use of regular mail, did the GA Supreme Court deny 14th Amdt. Due Process under *Jones v. Flowers*, 547 U.S. 220 (2006), and *Luessenhop v. Clinton Co., N.Y.*, 466 F.3d 259 (2nd Cir. 2006)?

2.

In relying on a state conclusive presumption in **reciprocal** attorney disciplinary proceedings, did the Fifth Circuit deny 5th Amdt. Due Process under *Selling v. Radford*, 243 U.S. 46 (1917); *Tu v. National Transp. Safety Bd.*, 470 F.3d 941 (9th Cir. 2006), or violate "principles of right and justice" under *Theard v. United States*, 354 U.S. 278 (1957)?

3.

Did the Fifth Circuit abuse its discretion under Rule 46(a), Fed.R.App.P., and principles of right and justice applied in *Frazier v. Heebe*, 482 U.S. 641 (1988), in not readmitting Petitioner to its Bar by interposing **"this court's practice"** (unpublished) of requiring readmission to original, out-of-circuit state court? *But cf. Surrick v. Killion*, 449 F.3d 520 (3rd Cir. 2006), and *In re Fallin*, 255 F.3d 195 (4th Cir. 2001).

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[1] Petitioner has at all material times been a member in uninterrupted good standing of the Bar of the Supreme Court of the United States (1978) and other courts which were informed of GA action. Aff. to Jt.Pets., ¶52 & Ex.1.

LIST OF DEEMED PARTIES TO CASE IN COURT OF APPEALS

Fifth Circuit judges: Edith H. Jones, Chief Judge;[2] Carolyn Dineen King, Thomas M. Reavley,[3] Will Garwood, E. Grady Jolly, Patrick E. Higginbotham, W. Eugene Davis, Jerry E. Smith,[4] John M. Duhé Jr., Jacques L. Wiener, Jr., Rhesa H. Barksdale, Emilio M. Garza,[5] Harold R. DeMoss, Jr., Fortunato P. Benavides, Carl E. Stewart, James L. Dennis, Edith Brown Clement,[6] Edward Charles Prado, Priscilla Richman Owen, Circuit Judges. Fifth Circuit clerk: Charles R. Fulbruge III.

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[2] Acting as sole judge, November 9, 2006, and panel member, August 10, 2007, to reconsider own decision.

[3] Panel member, August 10, 2007.

[4] Panel member, August 8, 2006, and August 10, 2007.

[5] Panel member, August 8, 2006.

[6] Panel member, August 8, 2006.

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PETITION FOR WRIT OF *CERTIORARI*

Petitioner, a member in uninterrupted good standing of the Bar of the Supreme Court of the United States (since 1978), and other courts,[1] petitions for Writ of *Certiorari* to review judgments that deny Petition for Readmission to Fifth Circuit Bar. The court admits that Petitioner is a member of the Bar of "some other courts," but denies them Full Faith and Credit. Instead, it relies on "this court's practice," an unpublished circuit rule, to deny readmission notwithstanding an underlying state disciplinary decision that is unworthy of federal reciprocal recognition under 5th Amdt. Due Process or principles of right and justice.

OPINIONS BELOW

Opinions are dated Aug. 10, 2007 (1a), Nov. 9, 2006 (5a), Aug. 8, 2006 (7a), and July 15, 1994 (10a), and are so far unreported. Material communications from the clerk's office are dated Aug. 4, 1994 (15a), June 13, 2006 (17a), and Oct. 6, 2006 (18a).

JURISDICTION

To the Aug. 10, 2007 (1a) opinion Petitioner filed petitions for panel and *en banc* rehearing that were denied Oct. 12, 2007 (11a). This Court has jurisdiction under 28 U.S.C. §1254(1). Petitioner invokes this Court's jurisdiction over previous Fifth Circuit decisions pursuant to Sup.Ct.R.12.4 and *Christianson v. Colt Indus. Op. Corp.*, 486 U.S. 800, 818 (1988).

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[1] Aff.Jt.Pets. ¶52; ex.1, July 13, 2006.

CONSTITUTIONAL & STATUTORY PROVISIONS

Art. I, IV, VI, 5th, 14th Amdts., U.S. Const.; 28 U.S.C. §§46(c), 2077(a); FRAP 27(c), 46(a), 47(b) in App.

STATEMENT OF THE CASE

Petitioner is **actually innocent** of any misconduct (Aff.,J.E.Spence,Jr., former Assistant General Counsel ("AGC") of State Bar of GA ("Bar")). He won a fee arbitration and reconsideration on the same facts as later alleged in Bar complaints (T-95).[2] No complaint was sworn. And there is not in any record any sworn evidence against Petitioner on the merits of the grievances whatsoever.

GEORGIA PROCEEDINGS

GA Bar's Informal Notice of Grievance

Petitioner was admitted to the Bar in 1971, and as required, furnished his address and **telephone number to the Bar.**

An ex-client filed an unsworn petition for fee arbitration with the Bar in Jan. 1991, which scheduled arbitration on July 12, 1991, and notified Petitioner **by regular mail**. Petitioner filed a response.[3]

May 1991, the ex-client hired a lawyer who filed with the Bar an unsworn grievance against Petitioner on the same subject matter as her

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[2] Transcript, Special Master's Hearing, May 20, 1993 ("T-"), at 331 (5-9) ("Special Master: *** Mr. Bishop came in and vigorously opposed - well, defended himself in the fee arbitration, won, won, won, won. I mean he certainly wasn't running from a fight he couldn't win because he won it."). Victory caused Petitioner to think grievance matter was "dead, gone and over with." T-98, T-331(7-9).

[3] Underlying facts are sketched in *Cert.* Petition (p.2-4), filed May 5, 2003, in Case No. 02-1598, *Bishop v. U.S. District Court, NDGA*.

client's arbitration petition. Petitioner was notified **by regular mail** of the grievance on June 5, 1991, and he filed a response with the Bar.

The day prior to the fee arbitration, July 11, 1991, Bar employee Martha Winstead **telephoned** Petitioner on his Bar-listed number to remind him of fee arbitration being held the following day, July 12, 1991, at Bar headquarters (T-322).

From July 9, 1991 to Dec. 1993, Petitioner resided in Dawson Co., GA. Throughout that period, the Dawson Co. sheriff and postmaster knew that Petitioner lived in Dawson Co., knew that Petitioner lived with his parents in Dawson Co., and knew where Petitioner and his parents lived in Dawson Co. (T-347; 348; 349) (Affid. Padgett (1994); Affid. Cofield (1994)).

July 12, 1991, prior to fee arbitration held that day, Petitioner told AGC Paul Cohen in person at Bar headquarters in Atlanta, GA, that he lived in Dawson Co. (T-258; 264; 308; 322-323). Petitioner extracted a **promise from AGC Cohen** to telephone him before anything substantive happened in the case, on which Petitioner relied (T-98; 223; 308; Affid. Petitioner at 3 (Jan. 22, 1993); Petitioner's Motion, Mar. 18, 1993, p.6).

Shortly after losing the fee arbitration and in July 1991, the ex-client filed with the Bar his own grievance against Petitioner raising the same issues. The Bar notified Petitioner **by regular mail**, and Petitioner filed in July and Oct. 1991, with Cohen or his secretary responses to the two grievances.

AGC Cohen knew no later than Nov. 18, 1991, that Petitioner was using a local mailing address,

Post Office Box 11813, Atlanta, GA 30355 ("the post office box address") (T-7 (stipulation); D-1; D-2) because on that date the AGC addressed a letter to Petitioner at the post office box address, mailed **by regular mail**, which Petitioner received. Indeed there were **telephone calls** between AGC Cohen & Petitioner during this period (T-259, 264).

At all relevant times, Gayle Baker was Membership Coordinator for the Bar and kept the official membership list on computer (T-49; 271). Prior to July 9, 1991, Petitioner's address on the official membership list was 305 Buckhead Avenue, Atlanta, GA 30305 ("Buckhead, Fulton Co. address") (T-90). Petitioner moved from the Buckhead, Fulton Co. address on July 9, 1991 (T-30). **Petitioner told Membership Coordinator** Baker on Oct. 4, 1991, that he lived in Dawson Co. (T-29; 218; 280; 309; 354). He did so in answer to her question whether there should be a change of address in the course of his paying his delinquent 1991 Bar dues. He procured from Ms. Baker in her own handwriting a receipt for 1991 Bar dues suggesting remission of a $50 penalty for late payment, which she signed as "Office Manager" (T-218; 280 (19-25)[4]; D-19). As Membership Coordinator for the Bar, as a part of her normal duties, Ms. Baker would take changes of address verbally or by telephone (T-221; 282; 285). **Ms. Baker neglected to make any change to the Bar's**

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[4] T-280 (19-25) ("Q [Petitioner] And why was [the receipt] less? Why was it $50 less than what it should have been? A [Gayle Baker] I don't remember. Q Was it because I would have told you that I was no longer at 305 Buckhead Avenue and lived in Dawson County? A Yes, sir.").

record address on file for Petitioner (T-283; 351). At all material times a GA lawyer could use an office address, a residence address, or a post office box address as his or her official address (T-276).

At a subsequent hearing, the Special Master found as fact that Petitioner took reasonable steps after July 9, 1991, to change his address with the Bar and thought the Bar had his correct address.

July 11, 1991, Petitioner filed change of address with the Postal Service from the Buckhead, Fulton Co. address to the post office box address (T-102; SB-C). Commencing on that date **Petitioner began sharing the post office box with his parents with whom he resided in Dawson Co. His parents did business out of the post office box. Neither he nor his parents ever saw any notice or slip for Petitioner in the post office box in the relevant months of Jan., Apr., July 1992** (T-332-335).

From July 1985 to Aug. 17, 1992, Petitioner's telephone number was (404) 262-1110 (T-303; 344; Affid. Petitioner Jan. 1993). As late as Mar. 9, 1993, the Bar listed on its official membership list Petitioner's said telephone number (T-286; D-20). From July 15, 1991, to Aug. 17, 1992, at Petitioner's request, Southern Bell Telephone forwarded telephone calls on that telephone line to Petitioner's residence in Dawson Co. by "**remote call-forwarding**" (T-310; 323). **At no time was Petitioner's telephone out of service or disconnected** (T-303; 304; D-22; D-23; Affid. Petitioner Jan. 1993). Petitioner "was never telephoned by anybody with the State Bar or anybody else that there was a pending notice of investigation against [him] or a pending notice of

discipline against [him]." (T-323). At least one of Petitioner's parents was at the Dawson Co. residence where calls to Petitioner's telephone number would ring who could answer the phone (T-323; 349).

GA Bar's Insufficient Formal Notice of Action

Jan. 3, 1992, his last day of employment, AGC Cohen signed and directed his secretary Estelle Jackson to mail a "notice of investigation" as to each grievance to Petitioner **without telephoning Petitioner as Cohen had promised** Petitioner five months earlier. The Bar attempted certified-mail service of the notices of investigation on Petitioner at the Buckhead, Fulton Co. address. The certified mail packages indicated that notices or slips had been left for Petitioner. The post office returned the notices of investigation to the Bar marked "**unclaimed**" (T-54; SB-G & SB-H).

The slips or notices that the USPS was using in Jan. to July 1992 to alert an addressee of certified or registered mail **did not have a blank for the name of the sender** of the mail piece, only a blank for the zip code of origin (T-121; 123; 151; affid. Giles (1993)).

At no point did the Bar send the notices of investigation by regular mail.

Jan. 30, 1992, the Bar allegedly sent an investigator to the Buckhead, Fulton Co. address. AGC Jeffrey R. Davis (who had taken over the file from Cohen) did not inform the investigator that Petitioner was using a post office box address (T-291). The investigator did not check with the Postal Service, the Bar's Membership Coordinator (Gayle Baker); nor did he check with the Fulton

Co. or Dawson Co. sheriffs (T-296; 297). By hearsay, the investigator verbally informed Mr. Davis that Petitioner had been evicted from the Buckhead, Fulton Co. office (T-70).

At the Special Master's hearing, May 20, 1993, **the Bar stipulated that from and after Jan. 30, 1992, it knew that Petitioner could not be found at the Buckhead, Fulton Co. address** (T-28-29; 80). **Nevertheless, the Bar continued to seek to serve Petitioner at the Buckhead, Fulton Co. address but did not post notices of investigation or discipline on Petitioner's former premises**. Thus, all actions by the Bar after Jan. 30, 1992, were not steps that a person would take who actually wanted to notiify Petitioner of the disciplinary proceedings against him. Rather the Bar chose to blindly follow bar rules knowing that doing so was substantially certain not to lead to actual knowledge by Petitioner of bar proceedings.

Thereafter, the Bar's Investigative Panel directed issuance of a "notice of discipline" against Petitioner stating that the appropriate punishment was disbarment which, if not rejected within 23 days, would become an automatic disbarment under Bar rules. **Petitioner had no prior disciplinary record. There was no disciplinary rule establishing "default."** Then Bar Rule 4-208.1 merely provided that failure to respond to a notice of discipline authorized disbarment, without any finding on the merits.[5]

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[5] Rule 4-208.1. Notice of Discipline. In any case where the Investigative Panel or a subcommittee of the Panel finds probable cause, the Panel may issue a Notice of Discipline imposing any level of public disciplinary sanctions authorized

June 3, 1992, the clerk of the GA Supreme Court sent to Petitioner at his post office box address -- **by regular mail** that Petitioner received -- notice of the docketing of an unrelated case entitled, *King v. Bishop*, Case No. S92A1089 (Ga. 1992) (T-315; D-25).[6]

June 26, 1992, **Petitioner received service of process in Dawson Co. in an unrelated case** filed in the Family Court of Greenville Co., South Carolina, entitled *Sanders v. Bishop*, Case No. 92-DR-2662. Process was personally served on Petitioner's father. Writ of *Coram Nobis*, June 27, 1994, exhibit.

July 1, 1992, the Bar mailed the notice of discipline to Petitioner by registered mail to the Buckhead, Fulton Co. address. Shortly after mailing, **AGC Davis telephoned the U.S. Post Office** (575 Pharr Road, Atlanta) where Petitioner was sharing a post office box with his parents, for an explanation why the AGC had not received the

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by these rules. **The Notice of Discipline shall be a final order of disciplinary sanctions unless affirmatively rejected by the respondent as provided in Rule 4-208.3**. (emphasis added).

[6] Other contacts: Oct. 18, 1992, the Bar sent **by regular mail** notice of delinquent reporting of continuing legal education ("CLE") to Petitioner at the post office box address that he received (T-320; D-24). Nov. 26, 1992, the GA Supreme Court sent **by regular mail** to Petitioner's post office box that Petitioner received an order notifying him that he would be suspended if he did not complete his CLE requirements by year end 1992 (T-318). Dec. 17, 1992, Petitioner **appeared** before a Bar employee and executed an affidavit that he had completed CLE requirements. Because of Cohen's promise, Petitioner had no contact at this time with him or the Office of General Counsel.

"unclaimed" envelope in which the notice of discipline had been mailed to Petitioner by registered mail (T-64). **AGC Davis could have simply telephoned Petitioner, or asked the postmaster for the identity of the person(s) in whose name the post office box was rented and thereby would have received the particulars of Petitioner and his parents' address in Dawson Co. Bar did not send notice/discipline by regular mail.**

From Jan. 3, 1992 onward, the Bar took the position that it was not required to telephone or attempt to telephone Petitioner on the telephone number required of a member and recorded on its official membership list in order to facilitate service of disciplinary notices (T-306; 309; 343-344; SBG's Exceptions to Special Master's Report, June 16, 1993, p.2 ("**Rule 4-208.2 does not require phone calls.**")).

Petitioner did not have actual knowledge of Bar proceedings from Jan. 1, 1992 until Jan. 20, 1993. Petitioner never saw any notices or slips for certified mail or registered mail in the post office box in Jan., Apr., or July 1992 (T-94; 96; 213; 302; 307-308). **The Special Master stated at the May 20, 1993 hearing that he believed Petitioner when Petitioner stated that he did not see any notices in the post office box** that he shared with his parents (T-330).

> However, I will also say that when Mr. Bishop tells me he did not have any knowledge of this proceeding, and that he didn't ever see any slips in those boxes, I'll be totally candid with you, I believe him. [T-330 (19-23)]

In his Report, the Special Master found as fact that Petitioner did not know about the notices of investigation, the notice of discipline, or his disbarment until he read about same in a local newspaper, Jan. 20, 1993. The Bar stipulated in Exceptions to Special Master's Recommendations, June 16, 1993, p.5: "***As the Special Master found, Respondent did not have actual notice of the Notice of Discipline pending against him***."

GA Discipline

Jan. 8, 1993, the GA Supreme Court entered perfunctory disbarment. Jan. 20, 1993, Petitioner read about his disbarment in the *Fulton Co. Daily Report* (T-94), while waiting to go to lunch with an attorney friend. The Special Master pointed out that this was outside the ten-day period to seek reconsideration under court rules (T-331).

Jan. 22, 1993, Petitioner filed motion to vacate with affidavits which was supplemented several times. Initially, Petitioner offered two grounds for relief: denial of Due Process of Law guaranteed by the GA Const. (Art. I, Sec. I, Par. I) and the 14th Amdt. to the U.S. Const. The Bar opposed *vacatur*.

Feb. 18, 1993, the GA Supreme Court entered an order that stated in part:

> The motion for reconsideration in the above matter having been considered, it is ordered that it be remanded to the Review Panel, and that [a named person who later disqualified herself] be appointed as Special Master to hear evidence on the **sole issue of whether Respondent was properly served**. (emphasis added).

At a conference in the spring of 1993, with a special prosecutor appointed by the president of the Bar to represent the Bar in the proceedings against Petitioner, Special Prosecutor Robert Goldstucker told Petitioner that **the Bar was willing that his case be a "test case"** in order to "test" the constitutionality of the Bar service rules (T-332, 336).

The Special Master held a hearing on May 20, 1993, and **limited the scope of the hearing to the sole issue of whether Petitioner was properly served with the notices of investigation and the notice of discipline under the Bar rules. The Special Master explicitly refused to expand the scope of the hearing to include the issue of whether Petitioner was denied Due Process** (T-3; 31; 39; 42; 77-78; 202; 252; 262-263; 300; 330; 341; 358).

In his Report dated June 4, 1993, **the Special Master** found that the Bar had complied with Bar rules on service of notices of investigation and notice of discipline, but **held that the Bar had denied to Petitioner Due Process of Law** and recommended that the disbarment be set aside and Petitioner be allowed an opportunity to respond to the charges against him. **His report was the first time that the Special Master indicated that he was considering the issue of Due Process of Law**, although Petitioner had raised the issue and had tried, but had been rebuffed, in an effort to persuade him to consider evidence thereon.

Aug. 25, 1993, the 20 plus members of the **Review Panel entered an unanimous Report agreeing in all respects with the Special Master holding that the Bar had denied Due Process of**

Law to Petitioner and recommended that the disbarment be set aside and Petitioner be allowed an opportunity to respond to the charges against him.

Apr. 18, 1994, the **GA Supreme Court** entered disbarment with three dissents among seven justices. *In re Bishop*, 443 S.E.2d 734 (Ga. 1994). The court employed a **Conclusive Presumption** that Petitioner saw but did not present unidentified mail slips for certified and registered mail, **despite the Special Master's and the Review Panel's findings of fact to the contrary**. The only stated basis for the disbarment was failure to respond to slips or notices addressed to the Buckhead, Fulton Co. address and forwarded to the post office address but returned "unclaimed." The court disagreed with the Special Master and Review Panel that the Bar denied Due Process to Petitioner, but the court did not clarify whether it was determining Due Process under state or federal constitutions and **did not cite to a single case from GA although there were several supporting Petitioner's claim of Due Process denial.**[7] The court did not acknowledge that the remand to the Review Panel and Special Master was limited to "the sole issue of whether Respondent was properly served" under the bar rules, nor that both the Special Master and Review Panel had limited consideration of Petitioner's evidence thereto. **Simultaneously with**

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[7] *Strickland v. Willingham*, 175 S.E. 605 (Ga.App. 1934) (invalid purported substituted service on attorney, raised seven years later); *Roland v. Shelton*, 127 S.E.2d 497 (Ga.App. 1962); *see Abba Gana v. Abba Gana*, 304 S.E.2d 909 (Ga. 1983).

disbarment, the court announced amendment of Bar rules without prior notice to the Bar or Petitioner and applied them to Petitioner *sub silentio*.[8]

June 27, 1994, Petitioner filed Motion for Writ of *Coram Nobis* which included envelopes mailed by regular and certified mail to "W. Kent Bishop, Dawson County, GA 30534" that had been received by Petitioner at his residence in Dawson Co.

Sept. 16, 1994, the GA Supreme Court denied all motions. *Cert.* denied.

FIFTH CIRCUIT PROCEEDINGS[9]

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[8] According to internal court memoranda (discovered in court file, June 30, 1994, submitted in July 1994 to Fifth Circuit), the GA Supreme Court delayed its decision in Petitioner's case until it could publish amended bar rules – bypassing the Bar's Board of Governors contrary to bar rules (T-337) – in which the court changed the law to state (i) that violation of just-amended Rule 1-207 (*Change of Address*) could result in discipline, (ii) use of post-office box address with the Bar forfeits any right to personal service of disciplinary notices, (iii) notice to any Bar employee other than the Membership Department is not notice to the Bar. Amended Rule 4-208.1(b) provided for default – for the first time – by stating that default eliminates any right to an evidentiary hearing. April 14, 1994, these rules were first made known to the general membership of the Bar in the advance sheets of GA Supreme Court opinions, which Petitioner did not receive in the mail as part of his subscription until April 23, 1994, or a week after disbarment. The new rules "fixed" the problems that Petitioner's case illustrated. It was a 14th Amdt. Due Process violation to apply new amended rules to disbar Petitioner and not to notify him of their existence until after he was disbarred under them. *Cf. Londoner v. Denver*, 210 U.S. 373 (1908); *RR Village Assoc. v. Denver Sewer Corp.*, 826 F.2d 1197 (2nd Cir. 1987).

[9] *See Cert.* Petition 4-9, *Bishop v. Fifth Circuit*.

1994 Disposition by Chief Judge. Petitioner was disbarred by **Politz**,CJ., July 15, 1994 (10a), who prevented further review (15a).[10] The order was perfunctory and void. 28 U.S.C. §46(c) (20a); Rule 27(c) (21a), Fed.R.App.P. *Id.*n.9 at 10-15.

2006 *Jones v. Flowers*, 547 U.S. 220 (2006), suggests GA violated 14th Amdt. Due Process. Fifth Circuit records contain proof that each court had denied full and fair opportunity to litigate federal due process. Accordingly, Petitioner filed July 14, 2006, Petition for Readmission to Fifth Circuit Bar, Motion to Incorporate Fifth Circuit Record from Previous Proceedings, Affidavit, and Memorandum citing to *Jones*, and other petitions.

2006 Disposition By First Panel of Smith, Garza, Clement, JJ. was to deny petitions and motion, Aug. 8, 2006 (7a), stating: "This court has no 'appellate' jurisdiction over proceedings concerning admission to practice law before us." In his 2006 *Cert.* Petition, ultimately "prior to judgment," Petitioner **acknowledged** that the court did not rule on his *Jones* Due Process claim (p.15).

2006 Ruling By Chief Judge was unexpected, again denied readmission by certified Order received Nov. 14, 2006 (5a), and held:

> However, we have received no information that Mr. Bishop has sought readmission to the Georgia bar. Absent unusual circumstances, it

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[10] In 1966–1967, after graduation from Duke University (with Distinction in Economics) in 1961 and Harvard Law School in 1966 with LL.B. degree (transformed in 1969 to J.D. degree), Petitioner served as assistant law clerk to Honorable Griffin B. Bell, Fifth Circuit Judge, at his chambers in Atlanta. Jt.Pets. ¶8: Aff. ¶50.

> is **this court's practice** to condition readmission on the resumption of active status in good standing with the bar of the original disciplining court. Mr. Bishop's submissions do not make out sufficient reasons for a departure from **this practice**.... [emphasis added; 6a].

"This court's practice" had never been previously published and thus violated 28 U.S.C. § 2077(a) & Rule 47(b), Fed.R.App. P. (21a). *Jones* was ignored. Weeks after *Cert.* Pet. was filed re Aug. 8, 2006 order, futile reconsideration was sought.[11]

2007 Disposition By Second Panel of Jones,C.J., Reavley, Smith,JJ. – while trivializing Petitioner's several bar memberships – acknowledged the GA Special Master's finding that "**Bishop did not have actual knowledge of the disciplinary proceedings**" (2a,n.1) and again denied readmission, stating:

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[11] Chief Judge's Order relied upon Eleventh Circuit (1995) and NDGA (2002) reciprocal discipline entered pre-*Jones* (2006). Eleventh Circuit's discipline was perfunctory, and NDGA's was purely derivative, as its committee observed: "It stands to reason that if there was some injustice or wrong visited upon [Petitioner] in the state proceedings, it would have been picked up by one of the three other [federal] courts." To prove no moral fault, Petitioner submitted as exhibits: NDGA 2001 transcript, Eleventh Circuit orders (1995), and 2003 *Cert.* Petition (Case No. 02-1598) appending decisions showing that conduct was never at issue. Petitioner was deprived of full and fair opportunity to litigate moral fault. In NDGA he was not allowed to contest Final Report of Disciplinary Committee (Oct. 31, 2001 letter from Evans,DJ.), despite Vining,CDJ's Jan. 7, 1999 ruling that GA had not disbarred for misconduct, which was slated to be the subject of future evidentiary hearing (Aff.Ex.2) -- which the NDGA and Eleventh Circuit eventually prevented.

> The notices were nevertheless returned unclaimed. The Georgia court determined that the facts before it formed the basis for a **reasonable inference** that Bishop did not receive the notices because he deliberately ignored the mail slips placed in the post office box. *** **We see no impediment under *Selling v. Radford* to the Georgia court's choosing to disbar an attorney who failed to respond to such notices.** *** [H]aving concluded that that proceeding satisfied the tests required by *Selling*, we do not find sufficient reason to exercise our discretion to readmit Bishop when he has not been readmitted by Georgia. [emphasis added]

The 14th Amdt. Due Process issue re GA discipline is examined *de novo*. There is no mention of laches or *res judicata* -- probably because Petitioner demonstrated that both GA and Fifth Circuit had previously deprived him of full and fair opportunity to litigate this issue. The panel ignores *Jones*. The Court's reliance on state use of Conclusive Presumption produces 5th Amdt. Due Process error and violates principles of right and justice. While it drops use of "this court's practice,"[12] the panel's

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[12] The 2007 decision presents ironies: Besides the court's attempt to recast "this court's practice," there are: (1) the court's deference to out-of-circuit GA and denigration of out-of-circuit NY, to whose bar Petitioner has been a member since 1968, thus implicating Full Faith and Credit Clause of Art. IV, Sec. 1 (19a) and 28 U.S.C. § 1738 (20a), and (2) the court's ignoring of the fact that Petitioner has diligently kept abreast of developments in law since the GA order was entered, has completed all NY-required CLE courses, and the NDGA Disciplinary Committee remarked:

unreasonable reading of *Selling* permits the inference that – despite appearances -- its *ratio decidendi* was "this court's practice."

REASONS WHY *CERTIORARI* SHOULD BE GRANTED

1. THERE IS CONFLICT WHETHER THE GA SUPREME COURT DENIED 14TH AMDT. DUE PROCESS UNDER *SELLING* FACTOR ONE, namely, "the state procedure for want of notice or opportunity to be heard was wanting in due process." 243 U.S. at 51.[13] There is conflict among the circuits on two

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"Some of this testimony regarding [Petitioner's] legal talents was particularly compelling."

[13] *Selling v. Radford*, 243 U.S. 46 (1917) states 14th Amdt. Due Process factors for the Supreme Court to apply to state disciplinary order to determine if reciprocal federal discipline should be administered to member of federal court bar, as "conditions": "[A federal court should recognize a state court disbarment to disbar an attorney from practicing before it -]

> unless, from an intrinsic consideration of the state record, one or all of the following conditions should appear: **1.** That **the state procedure for want of notice or opportunity to be heard was wanting in due process**; **2,** that there was such an **infirmity of proof as to facts found to have established the want of** fair private and professional **character** as to give rise to a clear conviction on [the court's] part that [it] could not consistently with [its] duty accept as final the conclusion on that subject; or **3,** that some **other grave reason** existed which should convince [the court] that to allow the natural consequences of the judgment to have their effect would conflict with the duty which rests upon [the federal court] not to disbar except upon the conviction that, under **the principles of right and justice**, [the court] were constrained so to do." [243 U.S. at 51; emphasis added.]

The GA disbarment satisfies these three conditions, and the Fifth Circuit should not have relied upon the GA judgment to disbar him from federal court or to deny him readmission.

different levels: treatment of lawyers versus lay persons; and treatment of lawyers versus aliens. In both cases lawyers are treated worse. *Cert.* would permit equal justice to lawyers – long overdue.

The Supreme Court in *Jones v. Flowers* held:

> We hold that when mailed notice of a tax sale is returned unclaimed, the State must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is practicable to do so. Under the circumstances presented here, additional reasonable steps were available to the State. [547 U.S. 220, 225.]

This holding focuses on state action to effect service of process **after having initially attempted, but failed, to consummate service.** Of application to the instant case, *Jones* requires gov't to consider unique facts and circumstances obtained by gov't **prior to its initiation of formal proceedings** to determine constitutional service. *Id.* 230. Recent cases in the Second Circuit and Ninth Circuit emphasize facts known **prior to formal proceedings**. These cases show that the Fifth Circuit, Eleventh Circuit, NDGA are out of step.

Second Circuit. *Luessenhop v. Clinton Co., N.Y.*, 466 F.3d 259, 270-272 (2nd Cir. 2006), analyzes unique facts and circumstances in 4 consolidated cases. In **Luessenhop**, property was located in Clinton County, its owner resided in DC and occasionally London; certified mail to the county address went unclaimed; and the court observed:

> In Luessenhop's case, it would not have been a terrible burden for the County to take at least one of the steps suggested in *Jones*; viz.,

sending a **first-class letter** to Luessenhop's Washington, D.C. address. Accordingly, the County's effort to provide notice to Luessenhop was insufficient to satisfy due process. [*Id.* 270; emphasis added.]

In **Baechle**, the Second Circuit elaborated:

On remand, the district court should consider the following matters. First, the precise mechanism Mendon [Vermont] employed to contact [Baechle] initially. Second, the record says nothing about what steps, if any, Mendon took to notify Baechle of the impending tax sale after Mendon was notified that Baechle did not receive the letters. On remand, the district court should determine what, if anything, Mendon did to ascertain Baechle's correct address. *** If the court is satisfied that Mendon did make further attempts to find Baechle, it should assess the adequacy of those measures. **Finally, the court should determine whether it was practicable for the government to have taken any additional step to inform Baechle of the impending sale of his property**. *** When considering the availability of reasonable additional steps, the court should consider whether Baechle's suggestions of consultation with the Rutland Department of Public Works or the condominium owners' association are reasonable under *Jones*. [*Id.* 271; emphasized.]

In **Tupaze**, the Second Circuit observed:

[T]he question that *Jones* tells us to ask is **whether the County *thought* that the Tupazes had received notice**. *** But the court never made a specific finding regarding whether the

County thought the Tupazes received the letter. This is a subtle but important distinction. *** Accordingly, the ... decision ... is vacated and ... remanded...."[14] [*Id.* 272; emphasis added.]

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[14] **ALIENS. Fifth Amdt. Due Process (19a) notice to aliens faced with deportation has received substantial, recent, circuit attention. In each of the following cases, aliens received more due process protection than did a lawyer in the Fifth Circuit, Eleventh Circuit, NDGA, and GA. *Cert.* in *Bishop* would place lawyers on equal plane with aliens.**

Third Circuit. *Perez-Alevante v. Gonzales*, 197 Fed.Appx. 191 (3rd Cir. 2006) (judgment denying motion to reopen removal proceedings was reversed on appeal) (permanent resident had signed notice that he could be removed if he did not kept INS informed of his address; attorney made appearance for movant; thereafter movant failed to appear at hearing after notice sent to old address. The court stated (p.195): "Similarly, **the fact that Perez-Alevante did not comply with his statutory responsibility to provide a current address did not necessarily mean that the immigration court was entirely relieved of its obligation to provide him with notice that met the requirements of the Due Process Clause [of the 5th Amdt.].**"

The court stated (p.196): "This additional step [notice to his counsel] requires *de minimus* effort by the government, and is balanced against the significant interest an alien facing removal has in being able to continue his professional and familial life in this country. *** Although *Jones* found a due process violation in the fact that the State took no additional steps to give notice *after* becoming aware that its initial attempt had been unsuccessful, the immigration court here had the contact information for Perez-Alevante's counsel *from the outset*."

Seventh Circuit. *Peralta-Cabrera v. Gonzales*, 501 F.3d 837, 843 (7th Cir. 2007) ("in most instances, it is the government's responsibility to ensure that notice by mail is successfully delivered, *see, e.g., Jones v. Flowers*....").

Ninth Cir. *Chaidez v. Gonzales*, 486 F.3d 1079 (9th Cir. 2007).

Ninth Circuit. *Tu v. NTSB*, 470 F.3d 941 (9th Cir. 2006), framed the 5th Amdt. Due Process issue as:

> We today decide whether **[a federal] agency** can effect notice of its ruling, so to start the running of time in which to appeal, by certified mail, when it has reason to know certified mail would not reach petitioner, whereas first-class mail would. [*Id.* 942; emphasis added.]

After describing the facts in *Jones v. Flowers*,[15] the court suggests that *Jones* should be read broadly:

> *A fortiori*, the FAA provided constitutionally defective notice in this case. The March 28 and April 8, 2003 suspension orders the FAA sent by certified mail were not "reasonably calculated to reach the intended recipient *when sent*. *Id.* The FAA knew certified mail sent to Tu had previously been returned on two separate occasions as "refused" or "unclaimed." What is more, knowing that certified mail was ineffective to reach Tu, the FAA had sent correspondence leading up to the suspension order by first class mail. **First class mail worked**. Tu responded to [it] in a timely manner. Nevertheless, the FAA sent the orders suspending Tu's license – triggering the 20-day appeal deadline – by certified mail alone. Unsurprisingly, these orders sent by certified mail

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Eleventh Circuit. Coming to the opposite result (judgment for the gov't) are *Dominguez v. U.S. Atty. Gen'l*, 284 F.3d 1258 (11th Cir. 2002) (alien's failure to submit second affidavit doomed him to deportation), and *Castillo v. U.S. Atty. Gen.*, 181 Fed.Appx. 885 (11th Cir. 2006).

[15] In *Tu*, Ninth Circuit noted that *Jones* was decided after case was briefed on appeal, but the court would apply *Jones* anyway. *Id.* 942-43.

were returned to the FAA as unclaimed. [*Id.* 946; fn.om.; emphasis added.]

Held: purported notice of suspension of pilot's license violated the 5th Amdt. Due Process Clause.

Application to Pre-Formal Complaint Stage.

In *Bishop*, while the GA court mentioned some unique facts preceding the bar's initiation of formal proceedings, the **GA opinion omits those facts concerning pre-formal proceedings that pertain to the Bar's numerous successful contacts with Petitioner by regular mail to his post office box address and by telephone at the number Petitioner was required to list, and did list, with the bar.** The GA court equated compliance with Bar service rules to compliance with due process standards. Parochial? Yes; but error just the same: "In prior cases, we have required the government to consider unique information about an intended recipient **regardless of whether a statutory scheme is reasonably calculated to provide notice in the ordinary case.**" *Jones*, 547 U.S. at 230 (emphasis added).

Application of Telephone Cases. Numerous cases require gov't to utilize the telephone to notify of gov't action when initial efforts to serve a party are unsuccessful. These cases are from the **Third Circuit** (*Foehl v. United States*, 238 F.3d 474 (3rd Cir. 2001)); **Fourth Circuit** (*Plemons v. Gale*, 396 F.3d 569 (4th Cir. 2005)); **Seventh Circuit** (*Laborers' Pension Fund v. Blackmore Sewer Constr., Inc.*, 298 F.3d 600 (7th Cir. 2002)); and **GA** (*Hamilton v. Renewed Hope, Inc.*, 589 S.E.2d 81 (Ga. 2003), 637 S.E.2d 412 (Ga. 2006).

The *Jones* court does not require AR to use the telephone directory to seek Jones among numerous people bearing the very common surname, "Jones." 547 U.S. at 235-36. But Petitioner's case is very different because the Bar required Petitioner to register **his telephone number** with the Bar; he did so; and it was **readily available to the Bar and GA court**. *Cert.* would clarify that **in such cases** a process server must use the telephone as a last resort to effect service.

Application to Bar's "Test Case". At the May 1993 hearing, the Special Master questioned Bar counsel about testimony that the Bar was pursuing Petitioner as a test of the constitutionality of the bar rules. Bar counsel admitted the charge was correct.[16] Unvarnished, the Bar was willing to disbar Petitioner – without a prior record -- to test its notion that it did not need to send notice by regular mail or post notice on the door of his former law office or telephone him with notice.

This admission by the Bar betrays a fundamental misunderstanding of 14th Amdt. Due Process as developed in *Jones*: "The Courts of Appeal and State Supreme Courts have addressed this question on frequent occasions, and most have decided that when the government learns its attempt at notice has failed, due process requires the government to do something more before real property may be sold in a tax sale." *Id.* 227 (fn.om). "In *Mullane*, we stated that 'when notice is a person's due ... [t]he means employed must be such as one **desirous of actually informing** the

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[16] T-332, 336; Aff.Jt.Pet. ¶33.

absentee might reasonably adopt to accomplish it,' 339 U.S., at 315, 70 S.Ct. 652 ...." *Id.* 229; emphasis added. In other words, to pursue a "test case" where the stakes are significant, individual property loss or professional license termination is to turn Due Process on its head. GA, Fifth Circuit, Eleventh Circuit badly need direction on this issue.

Application to Lawyers. Black letter law teaches that lawyers are not second class citizens. *Spevack v. Klein*, 385 U.S. 511, 516 (1967). A license to practice law in a State is a property interest protected by the 14th Amdt. Due Process Clause. *Willner v. Committee on Character & Fitness*, 373 U.S. 96, 102 (1963). A license to practice law in federal court is protected by the 5th Amdt., *In re Ruffalo*, 390 U.S. 544 (1968), and by principles of right and justice, *In re Snyder*, 472 U.S. 634 (1985). A law license is as valuable to an attorney as a house is to a lay person. Cf. *Ex parte Burr*, 9 Wheat. 529 (1824). Nevertheless, lawyers involved in "adversary proceedings of a *quasi*-criminal nature" (*Ruffalo*, 390 U.S. at 551) lack full constitutional protections. *In re Calvo*, 88 F.3d 962, 967 (11th Cir. 1996) ("**due process is limited** to 'want of notice or opportunity to be heard.'" (emphasis added)).[17] **This crimped reading of *Selling* should be rejected!**

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[17] *In re Kankekore*, 140 Fed.Appx. 848 (11th Cir. 2005), and *In re Kankekore*, 460 F.3d 276 (2nd Cir. 2006), are distinguishable because Kandekore did not contend that his NY Bar disbarment was void due to absence of Due Process. To repeat, Petitioner's case is different because he proves that GA denied 14th Amdt. Due Process and prominent jurisdictions support this position by retaining him as a member of their Bar.

Application To Collateral Proceeding Because *Jones* Expresses Old Rule With "New Wrinkle".

Consistently with *Whorton v. Bockting*, 127 S.Ct. 1173 (2007), *Jones* makes clear that it reflects an old rule:

> But we have never addressed whether due process entails further responsibility when the government becomes aware prior to the taking that its attempt at notice has failed. That is a **new wrinkle**, and we have explained that the "notice required will vary with circumstances and conditions." [*Id.* 227.]
>
> The dissent forcefully articulates some basic principles about constitutionally required notice, principles from which we have no intention to depart. In particular, **we disclaim any "new rule"** that is "contrary to *Dusenbery* and a significant departure from *Mullane*." [*Id.* 238; emphasis added.]

Cf. United States v. One Star Class Sloop Sailboat, 458 F.3d 16 (1st Cir. 2006); *Hess v. Pawloski*, 274 U.S. 352, 356 (1927) (*dictum*); *Wuchter v. Pizzutti*, 276 U.S. 13, 19 (1928).

Certiorari should be granted because the Fifth Circuit and Eleventh Circuit are not robustly examining the constitutionality of underlying state attorney disciplinary proceedings during federal reciprocal proceedings. Both circuits share a history of harsh treatment of lawyers;[18] and there has been no appellate review in the instant case.

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[18] *Theard v. United States*, 228 F.2d 617 (5th Cir. 1956), *rev'd* 354 U.S. 278 (1957); *Frazier v. Heebe*, 788 F.2d 1049 (5th Cir. 1986) (**Politz**,J.), *rev'd* 482 U.S. 641 (1987).

A *Frazier* type of supervisory *certiorari* is imperative. See 482 U.S. at 647, n.7.[19]

2. THERE IS CONFLICT ON THE NATURE AND SIGNIFICANCE OF STATE DISCIPLINE UPON RECIPROCAL FEDERAL ACTION UNDER *SELLING* FACTOR TWO (proof of misconduct), to wit:

> [A]lthough [membership in a state bar], after admission here, might be lost by **change of domicil** from one state to another, if so provided by the state law or rule of court, or by any other **cause not involving unworthiness, such loss would be wholly negligible upon the right to continue to be a member of the Bar of this court.** [243 U.S. at 49.]
>
> [We] do not in the slightest degree call in question the ruling in Ex parte Tillinghast, 4 Pet. 108, 7 L. ed. 798, that a **mere punishment for contempt** by an inferior Federal court was not a sufficient ground for preventing admission to the

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[19] "Rules that discriminate against nonresident attorneys are even more difficult to justify in the context of federal-court practice than they are in the area of state-court practice, where laws and procedures may differ substantially from State to State. There is a growing body of specialized federal law and a more mobile federal bar, accompanied by an increased demand for specialized legal services regardless of state boundaries. **The Court's supervisory power over federal courts allows the Court to intervene to protect the integrity of the federal system**, while its authority over state-court bars is limited to enforcing federal constitutional requirements. Because of these differences, the Court has repeatedly emphasized, for example, that disqualification from membership from a state bar does not necessarily lead to disqualification from a federal bar." [482 U.S. at 647-48; emphasis added; cits.om.]

> Bar of this court, there being **nothing to indicate** that the action of the inferior court was based upon the doing of **acts which inherently and necessarily deprived the applicant of the fair private and professional character** essential to admission. [*Id* 51; emphasis added.]

The only abscribed reasons for not readmitting Petitioner to Fifth Circuit Bar are (a) conclusively presumed past failure to present unidentified slips for certified/registered mail in a shared post office box and (b) lack of membership in GA Bar. The Fifth Circuit did not describe or imply that these reasons are evidence of misconduct. Excluding a lawyer from a federal bar for reasons not connected with misconduct is contrary to *Selling* Factor Two, *In re Ruffalo*, 390 U.S. 544 (1968); *Schware v. Board of Exam.*, 353 U.S. 232 (1957); *In re Mosher*, 25 F.3d 397 (6th Cir. 1994); *In re Palmisano*, 70 F.3d 483, 487 (7th Cir. 1995) (*dictum*); *In re Smith*, 100 F.Supp.2d 412 n.1 (N.D.TX 2000) (*dictum*).

Cert. would afford opportunity to clarify *Selling* and harmonize bar (re)admissions and disciplinary standards throughout the country.

3. THERE IS CONFLICT WHETHER INADEQUATE STATE NOTICE SHOULD PREVENT RECIPROCAL DISCIPLINE UNDER *SELLING* FACTOR THREE, "GRAVE REASON" UNDER "PRINCIPLES OF RIGHT AND JUSTICE," ASIDE FROM CONSTITUTIONAL CONSIDERATIONS. Drawing upon principles of right and justice cited in *Theard*, Harlan,J., *In re Ruffalo*, 390 U.S. 544, 552 (1968), preferred them over Due Process as a basis for decision:

> I see no need to decide whether the notice given [Ruffalo] of the charge that formed the basis of his subsequent federal disbarment [a 13th charge was added after Ruffalo and his railroad investigator Orlando had testified at the former's state disciplinary hearing] was adequate to afford him constitutional due process in the state proceedings. For I think that *Theard v. United States*, 354 U.S. 278, leaves us free to hold, as I would, that such notice should not be accepted as adequate for the purposes of disbarment from a federal court. On that basis, I concur in the judgment of the Court.

Procedural irregularity in state notice would constitute a "grave reason" under *Theard* (and *Selling*) not to disbar, but to readmit, even if constitutional.

4. THERE IS CONFLICT AS TO THE SCOPE OF RULE 46(a), FED.R.APP.P. (21a). Fifth Circuit would require Petitioner to be readmitted in GA before being readmitted there. Other circuits would disagree.

Fourth Circuit. *In re Fallin*, 255 F.3d 195, 197 (4th Cir. 2001), concerned disbarment proceedings in the Fourth Circuit against an attorney who had been indefinitely suspended from the practice of law by MD. The court observed: "Mr. Fallin's admission to practice law before this Court is predicated in part on his status as a member of the Maryland Bar. *See* Fed.R.App.P 46(a)(1)." The Fourth Circuit suspended Fallin from federal practice in imposing reciprocal discipline, but stated in connection with future reinstatement (p.198):

> We note, however, that our suspension order does not preclude Mr. Fallin from applying for

> readmission to practice in this Court **if his membership in the Maryland Bar is reinstated, *or if he otherwise complies with the provisions of Fed.R.App.P. 46(a)(1)*.** (emphasis added)

As Petitioner is member of USSC Bar, he would be readmitted to Fourth Circuit Bar under *Fallin* (if not already member).

Third Circuit: Surrick was suspended from the practice of law for five years by the PA Supreme Court. *Office of Discip. Co. v. Surrick*, 749 A.2d 441 (Pa. 2000). In reciprocal proceedings, EDPA imposed a lesser suspension of 30 months. *In re Surrick*, 2001 WL 1823945 (EDPA 2001), *aff'd* 338 F.3d 224 (3rd Cir. 2003). Under Local Rule 83.6 VII (I), Surrick could maintain a law office in PA to practice in federal court.[20] But in the meantime, the state court ruled in *Office of Discip. Co. v. Marcone*, 855 A.2d 654 (Pa. 2004), that while suspended from state law practice, Marcone could not open a law office in PA to practice law in the EDPA. Fearing similar treatment, Surrick filed suit against PA Bar under 42 U.S.C. § 1983 in EDPA. The district court permitted Surrick to open a law office in the district to practice in the district. The ruling was affirmed. *Surrick v. Killion*, 449 F.3d 520 (3rd Cir. 2006).

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[20] Local Rule Rule 83.6.VII(I) of EDPA Rules of Civ.P. stated:

> Any attorney who is reinstated may practice before the court notwithstanding the refusal or failure of any state court to reinstate said attorney to practice. However, reinstatement to practice before this court does not authorize an attorney to practice in any other jurisdiction, and an attorney shall not hold out himself or herself as authorized to practice law in any jurisdiction in which the attorney is not admitted. [449 F.3d at 531.]

The Third Circuit relied on *Frazier v. Heebe*, 482 U.S. 641, 647 n.7 (1987) ("disqualification from membership from a state bar does not necessarily lead to disqualification from a federal bar."); *Theard v. United States*, 354 U.S. 278, 282 (1957); *Selling v. Radford*, 243 U.S. 46, 49 (1917); *Chambers v. NASCO, Inc.* 501 U.S. 32, 43 (1991); *In re Poole*, 222 F.3d 618, 622 (9th Cir. 2000) ("[A]s nearly a century of Supreme Court precedent makes clear, practice before federal courts is not governed by state court rules."). "This power is rooted in both statute, see 28 U.S.C. § 2071(a) ...; 28 U.S.C. § 1654 ...; Rule 83 [Fed.R.Civ.P.], and the inherent authority of the federal courts [citing *Chambers*]." 449 F.3d at 531.

The Third Circuit (p.530) held that the case indisputably involved "conflict preemption" [under the Supremacy Clause, 19a] "which arises when 'state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' *Fid. Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 152, 153 ... (1982)" (cit. om.). The court cited *Sperry v. Florida ex rel. Florida Bar*, 373 U.S. 379 (1963), and *In re Desilets*, 291 F.3d 925, 930 (6th Cir. 2002) ("When state licensing laws purport to prohibit lawyers from doing that which federal law entitles them to do, the state law must give way.").[21]

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[21] Court added this note:

See In re Desilets, 291 F.3d at 329 (observing that although the enabling Congressional statute in *Sperry* expressly authorized federal authorities to determine who may practice law and 28 U.S.C. §§ 1654 & 2071 do not, this is a

More broadly, the *Surrick* court stated (p.532):

> Federal law preempts not only state laws that expressly prohibit the very act the federal law allows, but those that "stand as an obstacle to the accomplishment of the full purposes and objective" of federal law. Thus, federal and state law need not be contradictory on their faces for preemption to apply. It is sufficient that the state law "impose[s] ... additional conditions" not contemplated by Congress. [cits.om.]
>
> The reasons for the broad construction of the Supremacy Clause are plain. If preemption only applied to state laws that directly contradict federal laws, federal laws could be effectively nullified by state laws prohibiting those acts that are incident to, but not specifically authorized by, federal law. Under such a regime, state officials would have a "virtual power of review" over federal laws.

The *Surrick* court wisely observed (p.534): "[P]reemption analysis does not involve a balancing of state and federal interests." The court continued (p.535):

> Although consistency between state and federal courts is desirable in that it promotes respect for the law and prevents litigants from

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'distinction without a difference'); *cf. United States v. Hvass*, 355 U.S. 570, 575 (1968) (holding that rules and regulations promulgated by a district court that have been lawfully authorized and have a clear legislative base qualify as 'a law of the United States' ....). [449 F.3d at 532.]

> forum-shopping, **there is nothing inherently offensive about two sovereigns reaching different legal conclusions. Indeed, such results were contemplated by our federal system**, and neither sovereign is required to, nor expected to, yield to the other.

The Third Circuit noted (p.535): "While this case was pending, the [EDPA] adopted [a new local rule] which requires federal reinstatement to be held in abeyance until reinstatement to state practice has been decided." In a domain where federal interest should be high (membership in its own bar), a federal court bowed to state pressure. *Cf. Hanna v. Plumer*, 380 U.S. 460 (1965). It did not act like a representative of an independent sovereign. *Cf. Theard v. United States*, 354 U.S. 278 (1957).

The Fifth Circuit did essentially the same thing below. "This court's practice"[22] is nothing but a repudiation of *Theard* and *Frazier*, both of which reversed the Fifth Circuit; and they **demand supervisory *certiorari* to condemn creeping federal homogenization of federal and state attorney disciplinary proceedings.**

5. THERE IS CONFLICT WHETHER FEDERAL COURTS CAN APPLY CONCLUSIVE PRESUMPTIONS UTILIZED IN STATE PROCEEDINGS. In *Sandstrom v. Montana*,

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[22] "This court's practice," as identified in the Order and implicit in the 2007 opinion, constitutes the regulation of commerce among the several states. But this responsibility is confined to Congress, not to the federal courts, and the Fifth Circuit's "practice" violates the Commerce Clause of Art. I, Sec. 8, Cl. 3 (19a). *Cf. Goldfarb v. Virginia State Bar*, 421 U.S. 773, 785-86 (1975).

442 U.S. 510 (1979), the Court held unconstitutional this Conclusive Presumption: **the law presumes a person intends the ordinary consequences of his voluntary acts**. Recently, in *Chaidez* v. *Gonzales*, 486 F.3d 1079, 1085 (9th Cir. 2007), the court voided another conclusive presumption: **the U.S. Postal Service properly discharges its duties in serving process on aliens**. In *Frazier* v. *Heebe*, this Court held that a conclusive presumption that MS-resident lawyers are not qualified to be members of EDLA bar infringed principles of right and justice.

Applying these cases, **GA factfinders were the Special Master and Review Panel, not the GA Supreme Court. Recognizing itself as a constitutional court only, the GA court has repeatedly held that factfinding is concluded once the Review Panel determines the facts based on the Special Master's report**. *In re Morse*, 456 S.E.2d 52 (Ga. 1995); *In re Perry*, 622 S.E.2d 334 (Ga. 2005); *In re Ellison*, 627 S.E.2d 25 (Ga. 2006); *cf. Chambers* v. *Navarre*, 498 S.E.2d 173 (Ga.App. 1998) (appellate factual inference contrary to uncontradicted record evidence is outside court's jurisdiction under GA Const.). **The GA Supreme Court employed a Conclusive Presumption (of deliberate ignoring of unidentified mail slips in a shared post office box) to overwhelm the contrary unanimous findings of fact of the Special Master and Review Panel. This violated *Sandstrom*'s notion of 14th Amdt. Due Process. In federal court this would abridge principles of right and justice under *Frazier v. Heebe***. *Certiorari* would disabuse federal courts that federal law is defined by a state's notion of 14th Amdt. Due Process.

6. THERE IS CONFLICT WHETHER "THIS COURT'S PRACTICE" IS DISGUISED RESIDENCY TEST INVALID UNDER *FRAZIER* PRINCIPLES OF RIGHT AND JUSTICE. A citizen has an Art. IV, Sec. 2 (19a) "privilege and immunity" to travel from one state to another. *Saenz v. Roe*, 526 U.S. 489 (1999). Petitioner's son's recent hospitalization in CA (Aff.March 30, 2007) means that Petitioner must be free to travel to another state to earn sufficient income to support his son. An obvious target state would be NY where Petitioner is licensed to practice law. Requiring Petitioner to become readmitted in GA and pay dues while resuming the practice of law in NY would unduly burden Petitioner from relocating to NY. "This court's practice" impermissibly dilutes the privilege and immunity to travel freely from one state to another. In essence, the Fifth Circuit is imposing a Bar residency requirement on Petitioner -- which device was struck down under principles of right and justice in *Frazier v. Heebe*, 482 U.S. 641(1987). *Cf. Barnard v. Thorsten*, 489 U.S. 546 (1989); *Supreme Ct. of NH v. Piper*, 470 U.S. 274 (1985); *Supreme Ct. of VA v. Friedman*, 487 U.S. 59 (1988).

7. THERE IS CONFLICT REGARDING PROCEDURE FOR CONDUCTING RECIPROCAL PROCEEDINGS under 5th Amdt., 28 U.S.C. §§46(c), 2077(a), Rules 27(c), 46, Fed.R.App.P. (20a-21a). See cases cited in cert. petition, 10-15, 17-25, No. 06-738 (Sup.Ct.U.S. Nov. 22, 2006). *Christianson*, 486 U.S. at 818.

CONCLUSION: Please grant *certiorari*.

Respectfully submitted,
Winford Kent Bishop

Filed: August 10, 2007
Charles R. Fulbruge, III, Clerk

THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 07-29

IN RE WINFORD KENT BISHOP

August 9, 2007

Before JONES, Chief Judge, and REAVLEY and SMITH, Circuit Judges.

Per Curiam:

In 1994, after being disbarred by the Supreme Court of Georgia, Winford Kent Bishop was removed from the roll of attorneys licensed to practice in this court by an order of the Chief Judge imposing reciprocal discipline.

In 2006, Bishop filed a petition for readmission. This petition, which had been incorporated in a petition for writs of mandamus and prohibition, and for other relief, was denied by an order of the Chief Judge dated November 9, 2006. Bishop

now asks the court to reconsider the denial of his petition for readmission.

Bishop asserts that he should never have been reciprocally disciplined in the first place, and that he should be readmitted now, because he was not provided notice of the Georgia state proceedings in a manner consistent with due process. Bishop was disbarred by the Supreme Court of Georgia after failing to respond to notices of investigation sent by certified mail, and failing to respond to a notice of discipline sent by registered mail, to his office address of record.[1] The Supreme Court of Georgia concluded that while the address to which the notices had been sent was no longer Bishop's correct mailing address, the notices had been forwarded to a post office box actually used by Bishop for the receipt of mail. The notices were nevertheless returned unclaimed. The Georgia court determined that the facts before it formed the

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[1] Bishop learned about the disbarment from the newspaper, and objected arguing lack of notice. The court vacated the disbarment order and referred the matter to a special master to investigate the adequacy of notice. The special master conducted a hearing, at which post office employees testified regarding mail slips being placed in Bishop's post office box. The special master found that the bar complied with notice requirements, but recommended that the disbarment be set aside and that Bishop be allowed to address the underlying charges against him because Bishop did not have actual knowledge of the disciplinary proceedings. The review panel agreed, but the Supreme Court of Georgia rejected this recommendation. *Matter of Bishop*, 264 Ga. 241, 242, 442 S.E.2d 734, 735 (Ga. 1994), *cert. denied*, 513 U.S. 987, 115 S.Ct. 483 (1994).

basis for a reasonable inference that Bishop did not receive the notices because he deliberately ignored the mail slips placed in the post office box. Matter of Bishop, 264 Ga. at 242, 442 S.E.2d at 735. We see no impediment under Selling v. Radford to the Georgia court's choosing to disbar an attorney who failed to respond to such notices.[2]

Our conclusion that Bishop's disbarment by Georgia allowed us, consistently with Selling, to impose reciprocal discipline, is supported by Bishop's history in the federal courts in Georgia. He was reciprocally disbarred by the Eleventh Circuit, and certiorari was denied by the Supreme Court. In re Bishop, 11th Cir. No. 94-1133, January 5, 1995 (*unpublished*), *cert. denied*, 516 U.S. 880, 116 S.Ct. 215 (1995).

In 1998 the Eleventh Circuit remanded to the Northern District of Georgia the district court's reciprocal disbarment proceeding because it had not engaged in a Selling analysis. After a disciplinary committee investigation and an evidentiary hearing, the Northern District

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[2] When considering reciprocal discipline based on a state court discipline order, the Supreme Court has held that a federal court should recognize, and give effect to, the "condition created by the judgment of the state court unless, from an intrinsic consideration of the state record," it appears that the state proceedings was wanting in due process, that the evidence of misconduct was insufficient, or that other grave reason exists not to impose reciprocal discipline. *Selling v. Radford*, 243 U.S. 46, 51, 37 S.Ct. 377 (1917).

considered, pursuant to Selling, the same due process issues raised by Bishop before this court, and imposed reciprocal discipline. The Eleventh Circuit affirmed. In re Bishop, 11th Cir. No. 02-12061, October 2, 2002 (*unpublished*), *cert. denied*, 539 U.S. 943, 123 S.Ct. 2620 (2003).

Bishop also argues that the fact that he remained a member in good standing of some other courts (i.e., that these other courts did not impose reciprocal discipline) supports his position that he is eligible for readmission now. Membership in good standing in the bars of other jurisdictions does not prevent the imposition of reciprocal discipline nor require readmission after reciprocal discipline has been imposed. Bishop's arguments are directed principally at the propriety of his original disbarment by the Supreme Court of Georgia, and, having concluded that that proceeding satisfied the tests required by Selling, we do not find sufficient reason to exercise our discretion to readmit Bishop when he has not been readmitted by Georgia.

The petition is DENIED.

Filed: November 9, 2006
Received: Nov. 14, 2006
Charles R. Fulbruge, III, Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ORDER

On April 18, 1994 the Supreme Court of Georgia entered an order disbarring Winford Kent Bishop.[1] The Fifth Circuit issued Mr. Bishop an order to show cause why reciprocal discipline should not be imposed, and after considering Mr. Bishop's response, entered an order disbarring him. Mr. Bishop's subsequent petition to vacate the disbarment and to assign the proceeding to a three-judge panel for rehearing was denied.[2]

Mr. Bishop now moves for readmission to the bar of this court.[3] However, we have received no

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[1] *In re: W. Kent Bishop*, 264 Ga. 241, 442 S.E.2d 734 (Ga. 1994), *cert. denied*, 513 U.S. 987, 115 S.Ct. 483 (1994), *reh'g denied*, 513 U.S. 1105, 115 S.Ct. 786 (1995).

[2] The Eleventh Circuit imposed reciprocal discipline, and Mr. Bishop's petition for certiorari was denied. *Bishop v. State Bar of Georgia*, 516 U.S. 880, 116 S.Ct. 215 (1995), *reh'g denied*, 516 U.S. 1003, 116 S.Ct. 554 (1995). The Eleventh Circuit also affirmed reciprocal discipline imposed by the district court for the Northern District of Georgia. *In re Bishop*, 52 Fed.Appx. 493 (11th Cir. 2002) (*unpublished*), *cert. denied*, 539 U.S. 943, 123 S.Ct. 2620 (2003).

[3] Mr. Bishop's Petition for Readmission was joined with Petitions for Writ of Mandamus and for Writ of Prohibition, which were denied by the court in a per curiam opinion. *In*

information that Mr. Bishop has sought readmission to the Georgia bar. Absent unusual circumstances, it is this court's practice to condition readmission on the resumption of active status in good standing with the bar of the original disciplining court. Mr. Bishop's submissions do not make out sufficient reasons for a departure from this practice, and therefore

IT IS ORDERED that Winford Kent Bishop's Petition for Readmission is DENIED.

Done this 4th day of November, 2006.

s/ Edith H. Jones
EDITH H. JONES
CHIEFJUDGE

Re: Winford Kent Bishop, 5th Cir. No. 06-00029 (August 8, 2006). In this document, Mr. Bishop asked that the court "schedule oral argument on this petition." To the extent that Mr. Bishop sought oral argument on his petition for readmission, this request is denied.

Filed: August 8, 2006
Charles R. Fulbruge, III, Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 06-00029

IN RE: WINFORD KENT BISHOP,

Petitioner.

Petition for Writs of Mandamus and Prohibition
to the United States Court of Appeals
for the Fifth Judicial Circuit
and Petition for Readmission to the Fifth Circuit Bar

Before SMITH, GARZA, and CLEMENT, Circuit Judges.

PER CURIAM:

Winford Kent Bishop has filed in this court a pro se petition for a writ of mandamus, a writ of prohibition, and a petition for readmission to the Fifth Circuit Bar. Bishop, an attorney, argues that his 1994 disbarment in Georgia was unconstitutionally contrived and that this court

also unconstitutionally disbarred him from practice before us in 1994. He argues that then-Chief Judge Henry A. Politz could not act unilaterally in disbarring him from the Fifth Circuit, that he was entitled to an explanation, and that his disbarment was impermissibly based on the flawed Georgia disbarment.

As relief, Bishop asks that we direct the Clerk of the Fifth Circuit Court of Appeals to assign Bishop's disbarment proceeding to a regular three-judge panel and to send Bishop a copy of our non-public court policies. He asks that we direct the Fifth Circuit Court of Appeals to vacate his July 15, 1994, disbarment, [page 2] prohibit the chief judge from adjudicating the proceeding as a one-judge matter, readmit him to the Bar of the Fifth Circuit, and schedule oral argument on this mandamus petition.

The All Writs Act, 28 U.S.C. § 1651(a), sets out the limits of our mandamus authority: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." The writ of mandamus "has traditionally been used in the federal courts only to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35 (1980) (citations and internal quotation marks omitted). "As the jurisdiction of the circuit court of appeals is

exclusively appellate, its authority to issue writs of mandamus is restricted by statute to those cases in which the writ is in aid of that jurisdiction." *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 25 (1943).

This court has no "appellate" jurisdiction over proceedings concerning admission to practice law before us. Accordingly, we lack jurisdiction to entertain Bishop's requested relief. Bishop's motion to incorporate the record from proceedings in 1993 and 1994 is denied as moot.

PETITIONS DENIED; MOTION DENIED AS MOOT.

Filed: July 15, 1994
Charles R. Fulbruge, III, Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ORDER

W. Kent Bishop has filed a pleading entitled "Respondent's Showing of Good Cause Why Disbarment Should Not Be Ordered; Request For Oral Argument, Evidentiary Hearing, and Expedited Treatment", in answer to this Court's May 25, 1994 Show Cause Order. After review of the response and extensive supporting materials, the Requests for Oral Argument and an Evidentiary Hearing are DENIED; the Request for Expedited Treatment is DENIED as moot, and it is HEREBY ORDERED that W. Kent Bishop be disbarred from practice before this court, effective this 11th day of July, 1994.

s/ Henry A. Politz
Henry A. Politz
Chief Judge
United States Court of
Appeals for the Fifth
Circuit

Filed: October 12, 2007
Charles R. Fulbruge, III, Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 07-00029

In Re: WINFORD KENT BISHOP

Petitioner

- -

In Re: WINFORD KENT BISHOP

- -

ON PETITION FOR REHEARING AND REHEARING EN BANC

Before JONES, Chief Judge, and REAVLEY and SMITH, Circuit Judges.

PER CURIAM:
(X) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (Fed.R.App.P. and 5th Cir. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor, (Fed.R. App.P. and 5th Cir. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service and not disqualified not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

s/ Edith H. Jones
United States Circuit Judge

REHG-4A

Filed: October 4, 2006
Charles R. Fulbruge, III, Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 06-00029

WINFORD KENT BISHOP

Petitioner

- -

Petition for Writs of Mandamus and Prohibition
to the United States Court of Appeals
for the Fifth Judicial Circuit
and Petition for Readmission to the Fifth Circuit Bar

- -

ON PETITION FOR REHEARING AND REHEARING EN BANC

(Opinion 08/08/06, 5 Cir.,____, ____ F.3d _____)

Before SMITH, GARZA, and CLEMENT, Circuit Judges.

PER CURIAM:
(X) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active

service on the court having requested that the court be polled on Rehearing En Banc, (Fed.R.App.P. and 5th Cir. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor, (Fed.R. App.P. and 5th Cir. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service and not disqualified not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

s/ Jerry Smith
United States Circuit Judge

REHG-4A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

CHARLES R. FULBRUGE III
CLERK

TEL. 504-589-6514
600 CAMP STREET
NEW ORLEANS, LA. 70130

August 4, 1994

Mr. W. Kent Bishop
Attorney at Law
P.O. Box 11813
Atlanta, Georgia 30355

Dear Mr. Bishop:

I forwarded your "Petition to Vacate Void, Single-Judge Order Coram Non Judice, To Appeal/Assign Proceedings to Established Three-Judge Panel, for (Re)hearing, and Suggestion for (Re)hearing en banc" to the Court.

I have been directed to advise you that this matter will not be referred to a three-judge panel, nor heard en banc, nor will a special master be appointed.

When the Eleventh Circuit concludes its action on your case, please advise us of the results. Until that time, your name will remain removed from the rolls of attorneys permitted to practice before this Court, and the Order entered July 15, 1994 remains intact.

Sincerely,

s/ Charles R. Fulbruge III
Charles R. Fulbruge III

Email dated June 13, 2006, from Fifth Circuit Deputy Clerk Saltzman (Shelley_Saltzman@ca5.uscourts.gov) to Petitioner (wkentbishop@hotmail.com):

Dear Mr. Bishop:

Further to your telephone inquiry this morning, please be advised that this court follows the procedures set out in FRAP 46 governing attorney admissions and attorney discipline. With regard to your question about the delegation of such matters to the chief judge (rather than a three-judge panel as happens in other circuits), please be advised further that this court's internal policies provide that the chief judge, or a designee, shall handle all suspensions, removals from the court's roll, and other disciplinary matters. These policies were most recently affirmed in January 2006.

The court's internal policies are not for public distribution and I am, therefore, unable to provide you with a copy.

Yours sincerely,

Shelley E. Saltzman
Deputy Clerk
Court of Appeals for the Fifth Circuit
600 S. Maestri Place
New Orleans, LA 70130

Tel: 504-310-7700

Email dated October 6, 2006, from Fifth Circuit Deputy Clerk Lopez (Allison_Lopez@ca5.uscourts.gov) to Petitioner (wkentbishop@hotmail.com):

> You may serve the Clerk of Court with a courtesy copy of your petition filed with the Supreme Court.

Email dated October 6, 2006, from Petitioner to Ms. Lopez:

> October 6, 2006
> Ms. Lopez:
>
> I have a present intention to seek in the Supreme Court of the United States a writ of certiorari to the Fifth Circuit.
>
> I presume that this email will fulfill any duty to give notice.
>
> Whom should I list in the Proof of Service of the Petition – the Court itself, the Clerk of Court, or the individual judges?
>
> Thank you, Kent Bishop

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED IN THIS PETITION

Art. I, Sec. 8, Cl. 3 ("The Commerce Clause"): "The Congress shall have Power ... To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes...."

Art. IV, Sec. 1 ("The Full Faith and Credit Clause"): "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Art. IV, Sec. 2, Cl. 1 ("The Privileges and Immunities Clause"): "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

Art. VI, Par. II ("The Supremacy Clause"): "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

The Fifth Amendment to the United States Constitution states, in relevant part: "No person shall ... be deprived of life, liberty, or property, without due process of law ...."

The Fourteenth Amendment states, in relevant part: "No State shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 46(c) of Title 28 U.S.C. provides in part that:

"Cases and controversies shall be heard and determined by a court or **panel of not more than three judges** ..., unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service. ***" (emphasis added).

Section 1738 of Title 28 U.S.C. ("State and Territorial statutes and judicial proceedings; full faith and credit"): The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies therof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such

State, Territory or Possession from which they are taken.

Section 2077(a) of Title 28 U.S.C. provides that: "The **rules** for the conduct of the business of each court of appeals, including the operating procedures of such court, **shall be published**." (emphasis added).

Rule 27(c) of Fed.R.App.P. provides that: "(c) Power of Single Judge to Entertain Motions. In addition to the authority expressly conferred by these rules or by law, a single judge of a court of appeals may entertain and may grant or deny any request for relief which under these rules may properly be sought by motion, except that **a single judge may not dismiss or otherwise determine an** appeal or **other proceeding**, and except that a court of appeals may provide by order or rule that any motion or class of motions must be acted upon by the court. The action of a single judge may be reviewed by the court." (emphasis added).

Rule 46(a) of Fed.R.App.P. provides that: "(a) An attorney is eligible for admission to the bar of a [federal] court of appeals if that attorney is of good moral and professional character and is admitted to practice before ... the highest court of a state [.]"

Rule 47(b) of Fed.R.App.P. provides that: "(b) No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local circuit rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement."

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(2)

No. 07-911

FILED
APR 11 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

WINFORD KENT BISHOP,

Petitioner,

v.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT,

Respondent.

On Petition For Writ Of *Certiorari*
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR REHEARING

WINFORD KENT BISHOP
Counsel of Record
1080 Old Roswell Road
Roswell, Georgia 30076
(770) 587-2857

April 11, 2008

PENDING in the Supreme Court of New York, Appellate Division, First Department, is a Petition for Reciprocal Discipline against Bishop based upon the GA Order of January 8, 1993. Filed January 2008, at the behest of the Fifth Circuit,[1] with assistance from the GA Bar,[2] by the NY Departmental Disciplinary Committee ("DDC"), it was **submitted for decision on February 25.** Deemed a motion, the Motions Clerk advises that decisions are rendered in four to eight weeks, or **by April 21.**[3] While Bishop's inclination would be to await decision, high court employees suggest the proper course is to file this Petition for Rehearing (of *certiorari* denial on March 17) which would not go to conference before May 9. Bishop has a present intention to advise the high court by May 7 of the status of the contested NY petition.

Bishop's answer to the NY petition includes the Fifth Circuit's August 10, 2007 decision (the basis for the instant *cert.* petition) which relies heavily on reciprocal discipline imposed by the Eleventh Circuit and Northern District of GA prior to *Jones v.*

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[1] Telephone conversation initiated October 17, 2007, by John Puglise, identifying himself as Investigator for Departmental Disciplinary Committee (telephone no. 212-401-0800).

[2] Petition ¶2 states: "The Office of Chief Counsel received a copy of the Order of Disbarment [GA Order of Jan. 8, 1993] and the other documents from the State Bar of Georgia on September 10, 2007." The Petition omits any reference to the GA Order of Feb. 18, 1993, that vacated the GA Order of Jan. 8, 1993. It may be inferred that the GA Bar omitted a material fact and indeed misrepresented the true state of the GA Record of Proceedings to the DDC, an arm of court.

[3] Telephone conversation April 2, 2008, with Ronald Uzenski, Motions Clerk, A.D., 1st Dept. (telephone no. 212-340-0423).

Flowers, 547 U.S. 220 (2006), but which ignores Bishop's multiple citations to *Jones v. Flowers* and progeny.

Bishop's NY answer proves that the GA Bar and GA Supreme Court denied to him 14th Amdt. Due Process on the basis of numerous NY cases imposing duties of due diligence on plaintiffs.[4]

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[4] *Miron Lumber Co. v. Phylco Realty Dev. Co.*, 151 Misc.2d 620, 572 N.Y.S.2d 992 (City Civ. Ct. 1991) (NY law has an aversion to service of process by certified or registered mail and requires service by first class mail); *Dzembo v. Goran*, 178 A.D.2d 778, 577 N.Y.S.2d 691 (3 Dept. 1991) (plaintiff seeking to serve a defendant must utilize due diligence to locate the defendant's home address where the home address is available from a check of state records of car registrations or from local and state boards of elections, various public utilities, telephone records, post office, or property tax records. Where such information is available, service on a defendant at its office is fatally defective, despite a contention that a defendant engages in affirmative conduct designed to prevent a plaintiff from learning the defendant's home address as where a defendant's office employee refuses to give the defendant's home address to a process server); *Reinhard v. City of New York*, 34 A.D.3d 376, 825 N.Y.S.2d 44 (1 Dept 2006) (in disciplinary proceeding against NY firefighter, a process server's visiting the firefighter's home address three times over two days, affixing letter to door, mailing letter by first-class and certified mail, and sending copies of letter to firefighter's attorney and his union representative were held together to satisfy due process); *Jacoby v. New York State Bd. For Prof. Med. Cond.*, 295 A.D.2d 655, 743 N.Y.S.2d 192 (3 Dept. 2002) (plaintiff Board failed to show that personal service could not have been reasonably made with due diligence. Since defendant doctor's personal records were located at the Dep't of Education, the Board offered no explanation why service was not attempted at the permanent address so listed with the Dep't.); *Monteseoca v. Krams*, 194 Misc.2d 620, 755 N.Y.S.2d 581 (City Civ. Ct. 2003)

Bishop anticipates that the NY court will strongly disagree with the Fifth Circuit, Eleventh Circuit, NDGA and hold that the GA Bar and GA Supreme Court deprived him of 14th Amdt. Due Process. The NY court may be highly offended by the GA Bar's omission of material fact (the vacating GA Order of February 18, 1993) and resulting misrepresentation of material fact to the DDC, its agent. Added to the U.S. Supreme Court's own apparent decision not to initiate disciplinary proceedings against Bishop (member of its Bar since 1978), **this would create a clear conflict on the same state of facts which would enable the Supreme Court of the United States on *certiorari* to set minimum Due Process standards for federal and state disbarment proceedings and reciprocal attorney discipline**. For these reasons, his Petition for Rehearing should be granted – or stayed pending a NY decision highly likely to be boldly conflicting.

Respectfully submitted,

Winford Kent Bishop

(plaintiff's service of defendant at private mailbox maintained by him at commercial store required *vacatur* of default judgment in personal injury case, absent showing that attempts were made to secure defendant's residential or business addresses and serve process at either).

See also Sanders v. Elie, 29 A.D.3d 773, 816 N.Y.S.2d 509 (2 Dept. 2006) (plaintiff suffering personal injury failed to demonstrate that service by any of the ordinary methods was impracticable, as required for relief under statutory provision for service "as court directs"); *Harkness v. Doe*, 261 A.D.2d 846, 689 N.Y.S.2d 586 (4 Dept. 1999); *CC Home Lenders v. Cioffi*, 294 A.D.2d, 742 N.Y.S.2d 101 (2 Dept. 2002).

CERTIFICATE OF COUNSEL

I hereby certify that this Petition for Rehearing is submitted in good faith and not for delay. This Petition for Rehearing is restricted to the grounds set out in Rule 44.2.

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Winford Kent Bishop